

# **EXHIBIT 1**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.	)	<b>JURY TRIAL</b>
	)	
PLAINTIFFS,	)	NO. C 07-01658 PJH
	)	
VS.	)	<b>VOLUME 6</b>
	)	
SAP AG, ET AL.,	)	PAGES 947 - 1187
	)	
DEFENDANTS.	)	OAKLAND, CALIFORNIA
	)	TUESDAY, NOVEMBER 9, 2010

***CERTIFIED COPY***

**TRANSCRIPT OF PROCEEDINGS**

APPEARANCES:

FOR PLAINTIFFS:	BINGHAM MUCCUTCHEN LLP THREE EMBARCADERO CENTER SAN FRANCISCO, CALIFORNIA 94111-4607
BY:	ZACHARY J. ALINDER, HOLLY A. HOUSE, GEOFFREY M. HOWARD, DONN P. PICKETT, ATTORNEYS AT LAW
	BOIES, SCHILLER & FLEXNER LLP 1999 HARRISON STREET, SUITE 900 OAKLAND, CALIFORNIA 94612
BY:	DAVID BOIES, STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:	RAYNEE H. MERCADO, CSR NO. 8258
	DIANE E. SKILLMAN, CSR NO. 4909

***RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530***

1 OVER VERY BRIEFLY ARE BASED ON THE NUMBER OF ACTUAL CUSTOMERS  
2 THAT -- IN THE FIRST CATEGORY, THE ACTUAL CUSTOMERS WHO WENT  
3 FROM ORACLE SUPPORT TO TOMORROWNOW SUPPORT AS A RESULT OF  
4 TOMORROWNOW, CORRECT?

5 **A.** THAT'S CORRECT.

6 **Q.** AND THE SECOND CATEGORY ARE THE COMPANIES THAT WENT FROM  
7 ORACLE TO SAP TO BUY SOFTWARE AS A RESULT OF TOMORROWNOW,  
8 CORRECT?

9 **A.** IT WOULD BE THE -- WHATEVER IS REPORTED BY SAP. BUT IT'S  
10 ADDITIONAL REVENUES AND PROFITS THAT WERE GAINED BY WORKING IN  
11 CONJUNCTION WITH THE TOMORROWNOW OFFERING. SO IT'S THAT  
12 COMBINED OFFERING.

13 **Q.** OKAY.

14 AND TO COME UP WITH THOSE FIGURES, YOU LOOKED AT  
15 SOME OF THE CUSTOMERS AND YOU DECIDED, AS BEST YOU COULD BASED  
16 ON THE AVAILABLE EVIDENCE, WHY A CUSTOMER LEFT ORACLE FOR  
17 TOMORROWNOW AND WHY A CUSTOMER LEFT ORACLE FOR SAP, RIGHT?

18 **A.** IN A GENERAL SENSE, THAT'S CORRECT.

19 **Q.** OKAY.

20 LET ME ADD TO THAT CHART THE NUMBER OF CUSTOMERS  
21 THAT, BASED ON YOUR WORK, ARE IN THE FIRST CATEGORY. THE ONES  
22 THAT LEFT ORACLE FOR SUPPORT BY TOMORROWNOW AS A RESULT OF  
23 TOMORROWNOW.

24 WHAT NUMBER DID YOU COME UP WITH, NUMBER OF  
25 CUSTOMERS?

1 **A.** THAT HAVE LEFT. SO IF WE ARE JUST TALKING NOW ABOUT THE  
2 REMAINING PLAINTIFF, IN MY LOST PROFIT NUMBER OF 36, I HAVE 253  
3 CUSTOMERS.

4 **Q.** 253 CUSTOMERS.

5 AND MR. CLARKE HAS A SOMEWHAT LOWER NUMBER?

6 **A.** I BELIEVE IT'S AROUND 170. SOME OF THE CUSTOMERS HAVE --  
7 THERE'S COMBINATIONS, WHATNOT, BUT SAY 170.

8 **Q.** THE DIFFERENCE BETWEEN YOU AND MR. CLARKE IS OVER, WHAT IS  
9 THAT, 70, 80 CUSTOMERS, AND THE DIFFERENCE BETWEEN THE TWO OF  
10 YOU ON THOSE CUSTOMERS IS THEIR MOTIVATION FOR LEAVING ORACLE;  
11 WAS IT BECAUSE OF TOMORROWNOW OR WERE THEY GOING TO LEAVE  
12 ORACLE ANYWAY, RIGHT?

13 **A.** IF I FOLLOW THAT, MR. CLARKE EXCLUDES ANOTHER WHATEVER, 80  
14 CUSTOMERS, BELIEVING THAT THEY WOULD HAVE LEFT ORACLE FOR A  
15 VARIETY OF REASONS THAT HE'S COME UP WITH THAT I DO NOT ACCEPT.

16 I HAVE LOOKED AT HIS EXCLUSIONS, I DON'T THINK THEY  
17 ARE SUPPORTED, BUT HE WOULD SAY THAT HE HAS RATIONALE FOR WHY  
18 THEY LEFT.

19 **Q.** LET'S TAKE ONE EXAMPLE. THERE'S A COMPANY THAT LEFT  
20 ORACLE AND WENT TO ANOTHER THIRD PARTY PROVIDER CALLED  
21 VERITECH.

22 ARE YOU FAMILIAR WITH THAT THIRD PARTY PROVIDER?

23 **A.** MAYBE NOT SPECIFICALLY, BUT YOU CAN GO.

24 **Q.** OKAY. AND THAT CUSTOMER WAS GONE FOR TWO YEARS FROM  
25 ORACLE TO VERITECH. AND THEN AFTER TWO YEARS STOPPED VERITECH

**CERTIFICATE OF REPORTER**

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, TUESDAY, NOVEMBER 9, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

WEDNESDAY, NOVEMBER 10, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.	)	<b>JURY TRIAL</b>
	)	
PLAINTIFFS,	)	NO. C 07-01658 PJH
	)	
VS.	)	<b>VOLUME 7</b>
	)	
SAP AG, ET AL.,	)	PAGES 1188 - 1420
	)	
DEFENDANTS.	)	OAKLAND, CALIFORNIA
	)	FRIDAY, NOVEMBER 12, 2010

---

***CERTIFIED COPY***

**TRANSCRIPT OF PROCEEDINGS**

APPEARANCES:

FOR PLAINTIFFS:	BINGHAM MUCCUTCHEN LLP THREE EMBARCADERO CENTER SAN FRANCISCO, CALIFORNIA 94111-4607
BY:	ZACHARY J. ALINDER, HOLLY A. HOUSE, GEOFFREY M. HOWARD, DONN P. PICKETT, ATTORNEYS AT LAW
	BOIES, SCHILLER & FLEXNER LLP 1999 HARRISON STREET, SUITE 900 OAKLAND, CALIFORNIA 94612
BY:	DAVID BOIES, STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:	RAYNEE H. MERCADO, CSR NO. 8258
	DIANE E. SKILLMAN, CSR NO. 4909

***RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530***

1 THE LOST SUPPORT PROFITS. AND THESE ARE THE PEOPLESOFT  
2 CUSTOMERS WHO WERE AT ORACLE, AND THEN THEY WENT OVER TO  
3 TOMORROWNOW FOR SUPPORT FOR THEIR ORACLE OR PEOPLESOFT SOFTWARE,  
4 CORRECT?

5 **A.** YES.

6 **Q.** AND WHAT YOU WERE TRYING TO DO -- YOU KNOW THE TOTAL NUMBER  
7 OF TOMORROWNOW CUSTOMERS FROM PEOPLESOFT WAS 358, CORRECT?

8 **A.** YES.

9 **Q.** AND YOU WENT FROM 358 TO 253 BECAUSE YOU CONCLUDED THAT  
10 THERE WERE A LOT OF CUSTOMERS, THE DIFFERENCE BETWEEN 358 AND  
11 253, WHO WENT TO TOMORROWNOW BUT WERE GOING TO LEAVE ORACLE  
12 ANYWAY, CORRECT?

13 **A.** NO, THAT'S ACTUALLY NOT CORRECT. BASICALLY THE ONES THAT  
14 I'VE DROPPED OUT ARE BECAUSE THEY EITHER NEVER LEFT ORACLE; THEY  
15 SORT OF HAD SERVICE FROM BOTH COMPANIES. OR THEY REINSTATED  
16 WITH ORACLE -- THERE WERE 26 OF THEM -- SO THEY BASICALLY HAD TO  
17 PAY BACK LICENSE. AND THEN I THINK ANOTHER, LIKE, 20 WHERE  
18 THEY -- YOU KNOW, IN THE PLAINTIFF GROUP.

19 SO A LOT OF THEM ARE JUST SORT OF, YOU KNOW,  
20 NECESSARY ADJUSTMENTS TO GET APPLES AND APPLES. IF THEY DON'T  
21 LEAVE ORACLE, THEY SHOULDN'T BE IN THE LOST PROFITS OBVIOUSLY.  
22 AND IF THEY'RE A COMPANY THAT'S A DIFFERENT PLAINTIFF THAT'S NOT  
23 IN THE CASE RIGHT NOW, THEY SHOULDN'T BE IN THE NUMBER. SO  
24 THEY'RE MORE STRUCTURAL ADJUSTMENTS. THERE WERE A FEW SMALL  
25 ONES WHERE I PULLED THEM OUT FOR OTHER REASONS.

1 Q. WELL, AND ONE OF THE REASONS -- YOU RECALL THIS SMALL ONE,  
2 BUT ONE OF THE REASONS WAS THAT YOU CONCLUDED THAT THE CUSTOMER  
3 WOULD HAVE LEFT ORACLE ANYWAY, CORRECT? THEY WENT TO  
4 TOMORROWNOW, BUT THEY WERE GOING TO LEAVE ORACLE ANYWAY?

5 A. THERE MAY BE A FEW OF THOSE. WE'D HAVE TO TALK SPECIFICS.  
6 I DON'T WANT TO TALK GENERALITIES ABOUT THIS.

7 Q. BUT, LOOK, YOU'VE SPENT A LOT OF TIME ON THIS ANALYSIS,  
8 CORRECT?

9 A. I SPENT SOME TIME ON IT; THAT'S CORRECT.

10 Q. OKAY. AND ARE YOU SAYING THAT YOU CAN'T REMEMBER REMOVING  
11 ANY -- A SINGLE CUSTOMER ON THE GROUND THAT THEY WOULD HAVE LEFT  
12 ORACLE ANYWAY?

13 A. I'M NOT SAYING THAT.

14 Q. OKAY. YOU, IN FACT, REMEMBER SOME CUSTOMERS WHO YOU REMOVED  
15 FOR THAT REASON, CORRECT?

16 A. THERE ARE -- AS I MENTIONED, THERE ARE A FEW.

17 Q. OKAY.

18 AND YOUR IDEA -- YOUR NOTION WAS THAT IF -- THE

19 CUSTOMER WAS GOING TO LEAVE ORACLE ANYWAY, YOU CAN'T BLAME SAP

20 OR MAKE THEM REPAY ORACLE'S LOST PROFITS FOR THAT CUSTOMER.

21 A. ON THE LOST PROFITS, THAT REALLY WASN'T PART OF THE

22 METHODOLOGY. ON LOST PROFITS, BECAUSE TOMORROWNOW HAD PROVIDED

23 SERVICE AND IT PROVIDED A SERVICE THAT IT SHOULD NOT HAVE BEEN

24 PROVIDING BUT FOR TAKING SOFTWARE, IT WAS REALLY DIFFERENT. IT

25 WAS MOSTLY FOCUSING ON THE SPECIFICS OF WHO LEFT ORACLE, THE



1 TIMING, WHO WENT BACK.

2 THERE WERE A COUPLE OF THE CUSTOMERS THAT YOU AND I

3 CAN TALK ABOUT WHERE THAT HAPPENED. I'LL AGREE ON THE

4 INFRINGERS' PROFITS --

5 Q. SIR --

6 A. -- I MADE MORE OF THOSE ADJUSTMENTS.

7 Q. SIR, MY QUESTION IS, DO YOU -- DO YOU REMEMBER SOME  
8 CUSTOMERS WHO YOU REMOVED FOR THE REASON I GAVE; NAMELY, THAT  
9 THEY WERE GOING TO LEAVE ORACLE ANYWAY?

10 YOU REMEMBER THERE WERE SOME CUSTOMERS LIKE THAT,  
11 CORRECT?

12 A. MOSTLY ON THE INFRINGER'S PROFIT SIDE, BUT I WOULD SAY A FEW  
13 ON THIS SIDE.

14 Q. OKAY. SO LET'S JUST ILLUSTRATE THE APPROACH YOU TOOK  
15 WITH -- WITH COWLITZ COUNTY. YOU RECOGNIZE COWLITZ COUNTY IS A  
16 COUNTY UP IN THE -- WHAT IS IT, THE SOUTHWEST PART OF THE STATE  
17 OF WASHINGTON, CORRECT?

18 A. THAT'S CORRECT.

19 Q. OKAY. AND YOU AGREE THAT EXPERTS LIKE YOU RELY ON SWORN AND  
20 UNSWORN DECLARATIONS IN CONDUCTING LOST-PROFITS ANALYSIS, RIGHT?

21 A. FROM TIME TO TIME, THAT'S CORRECT.

22 Q. AND YOU DID IT IN THIS CASE, CORRECT?

23 A. AT ONE POINT -- ARE YOU -- COWLITZ IS NOT IN MY NUMBERS NOW.  
24 I THINK YOU KNOW THAT. IT'S NOT IN THE 253.

25 Q. SIR, COULD YOU JUST ANSWER MY QUESTION IN THE INTEREST OF

**CERTIFICATE OF REPORTER**

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, FRIDAY, NOVEMBER 12, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTERS' CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

SATURDAY, NOVEMBER 13, 2010